FILE COPY

Office Supreme Court, U.S.
FILED
SEP 24 1958
JAMES R. BROWNING, Clerk

No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1958

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL MARITIME BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Attorney,
Department of Justice, Washington 25, D. C.

E. ROBERT SEAVER,
General Counsel,
ROBERT E. MITCHELL,
Assistant General Counsel,
EDWARD APTAKER,
EDWARD SCHMELTZER,
Attorneys,
Federal Maritime Board, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	10

CITATIONS

Cases:

Pacific Far East Line, Inc. v. *Federal Maritime Board, et al.*, D. D. C., Civ. No. 1708–57 5

Richfield Oil Corp. v. *United States*, 207 F. 2d 864 9

Statutes:

Act of December 29, 1950, Section 2, 64 Stat. 1129, 5 U. S. C. 1032 ..... 2, 5, 6, 7, 9

Intercoastal Shipping Act, 1933, 47 Stat. 1425 8

Merchant Marine Act, 1936, Section 805 (a), 49 Stat. 2012, 46 U. S. C. 1223 (a) 3, 4, 5, 7

Shipping Act, 1916, 46 U. S. C. 842 7

Miscellaneous:

H. R. 2916, 81st Cong., 1st sess. 8

Reorganization Plan No. 21 of 1950, 64 Stat. 1273 9

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 319

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL MARITIME BOARD IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 5a–8a) is reported at 255 F. 2d 182.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958 (R. 638), and a timely petition for rehearing was denied on June 5, 1958 (R. 666–7). The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

5 U. S. C. 1032 gives courts of appeals jurisdiction to review final orders of the Federal Maritime Board "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended." The question presented is whether courts of appeals also have jurisdiction under this Section to review Board orders entered under authority of the Merchant Marine Act, 1936.

STATUTES INVOLVED

Section 2 of the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. 1032, commonly known as the Judicial Review Act of 1950, provides as follows:

> The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

Section 805 (a) of the Merchant Marine Act, 1936, 49 Stat. 2012, 46 U. S. C. 1223 (a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in

bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

STATEMENT

Petitioner filed in the Court of Appeals for the District of Columbia Circuit a petition to review an order of the Federal Maritime Board,[1] entered under Section 805 (a) of the Merchant Marine Act, 1936 (46

[1] The order was issued by the Board and the Maritime Administrator (who is also the Chairman of the Board). They are collectively referred to as "the Board."

U. S. C. 1223 (a)), which denied petitioner's application for its unsubsidized vessels to operate in the Pacific Coast-Hawaii trade.[2] The petition was filed pursuant to 5 U. S. C. 1032, which confers upon courts of appeals jurisdiction to review final orders of the Board "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended." Simultaneously, petitioner filed a complaint in the district court for review of the same order. *Pacific Far East Line, Inc.* v. *Federal Maritime Board, et al.*, D. D. C., Civ. No. 1708–57.

On the Board's motion, in which the United States (a statutory respondent) and Matson Navigation Company (an intervenor) concurred,[3] the court of appeals unanimously dismissed the petition for want of jurisdiction.[4] The court held (Pet. 7a–8a) that it was "clear, from a 'plain meaning' reading" of 5 U. S. C. 1032 that the grant of jurisdiction to review Board

[2] Section 805 (a) prohibits, without the Board's written permission, the payment of subsidy to any person who owns, operates or charters any vessels enagaged in the domestic, intercoastal or coastwise service. It further provides that the Board shall not grant any application which it finds "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act." In the instant case, the Board found that grant of petitioner's application would result in unfair competition to Matson Navigation Company, which also operates in the Pacific Coast-Hawaii trade, and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

[3] Although the United States concurred in the motion, it further argued that the Board had erred on the merits.

orders entered under authority of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, "does not vest this court with jurisdiction to review" an order entered under authority of the Merchant Marine Act, 1936; and that it did not "find that this produces an unreasonable result, or one plainly at variance with the policy of the legislation as a whole, or that legislative history requires a different interpretation."

Following the dismissal of the petition by the court of appeals, petitioner moved for summary judgment in the district court proceeding. That case is now pending on that motion and on defendants' cross motions for dismissal, summary judgment, and judgment on the pleadings.

ARGUMENT

The holding of the court of appeals that the limited grant of jurisdiction in 5 U. S. C. 1032 to review Board orders which are entered under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933 does not give it jurisdiction to review orders under the Merchant Marine Act, 1936, is clearly correct, and there is no occasion for further review by this Court.

On its face, 5 U. S. C. 1032 limits the court of appeals' jurisdiction to two categories of Board orders: those entered under the 1916 and the 1933 Acts, as amended. Petitioner attempts to avoid this plain meaning by arguing (Pet. 9–10) that the Merchant Marine Act, 1936, is in fact a part of the Shipping Act, 1916, "as amended," since the 1936 Act "not only amends the basic shipping laws of the United States first enacted in the Shipping Act, 1916," but

also amends the latter Act "in numerous detailed respects."[4]

But the fact that the 1936 Act amends the 1916 Act in some respects does not make it a part of the latter Act "as amended." The 1936 Act is not merely an amendment of the earlier statute, but is a separate Act, with its own short title ("Merchant Marine Act, 1936," 46 U. S. C. 1245) and with a discrete purpose. It is primarily a promotional statute dealing with subsidy and other forms of Government aid in the construction and operation of American-flag ships. The 1916 Act, on the other hand, is basically a regulatory statute governing such matters as competitive practices by carriers, agreements among them, and their dealings with shippers.

The phrase "Shipping Act, 1916" is the short title which Congress gave that Act. 46 U. S. C. 842. Had Congress intended in 5 U. S. C. 1032 to give courts of appeals jurisdiction over orders under the 1936 Act, it presumably would have referred to that statute by its short title ("Merchant Marine Act, 1936"), as it did with respect to the 1916 Act. Further indication that Congress did not intend to treat the 1936

[4] Petitioner further contends (Pet. 12) that even if the 1936 Act is not a part of the 1916 Act "as amended," the court of appeals nonetheless had jurisdiction to review the Board's order because it was entered "under authority" of the 1916 Act. It urges that the order is subject to Section 23 of the 1916 Act, which specifies the duration of Board orders "made" under the 1916 Act "as amended or supplemented." But the reference in 5 U. S. C. 1032 to orders entered "under authority" of the 1916 Act obviously means orders entered pursuant to that Act, *i. e.*, those which effectuate its substantive provisions, and not orders entered under some other Act which may be subject to certain procedural provisions of the 1916 Act.

Act as part of the 1916 Act "as amended" is that it specifically conferred jurisdiction to review Board orders entered under the Intercoastal Shipping Act, 1933. Since the title of the latter Act is "An Act Amending the Shipping Act, 1916, as amended, * * *" (47 Stat. 1425), there was no need to refer to the 1933 Act if, as petitioner contends, an Act which amends the 1916 Act thereby becomes part of the 1916 Act "as amended."

Petitioner contends (Pet. 11-12) that the legislative history of the Judicial Review Act of 1950 supports its view. It relies on statements of representatives of the Maritime Commission (the statutory predecessor of the Board) that the Act should apply to "all reviewable orders" of the agency. But these statements were made in response to the fact that the original bill (H. R. 2916, 81st Cong., 1st sess.) limited review to orders entered under specified sections of the 1916 and 1933 Acts. Read in context, these statements meant only that the Judicial Review Act should be extended to cover all agency orders entered under the 1916 and 1933 Acts, and should not be limited to those entered under particular sections thereof. The Commission's representatives did not urge, as petitioner implies, that the Judicial Review Act should apply to all orders entered by the agency under all of the statutes which it administers.

Petitioner also argues (Pet. 10-11) that since the Maritime Administration (as distinguished from the Board) issues orders only under the 1936 Act, the grant of jurisdiction to the courts of appeals to review orders of the Administration indicates a Con-

gressional purpose to provide for court of appeals' review of orders under the 1936 Act. A more logical explanation of the reference to the Administration, however, is that the Judicial Review Act of 1950 was drafted at approximately the same time that Reorganization Plan No. 21 of 1950 (64 Stat. 1273) went into effect. That plan divided the functions of the former Maritime Commission between the Federal Maritime Board and the Maritime Administration by assigning certain specified functions to the Board and giving the remaining functions to the Administration. In the Review Act, Congress apparently referred to the Administration as well as the Board in order to guard against the possibility that certain functions under the 1916 or 1933 Acts might have been given to the Administration or that, in some subsequent reorganization, some of the functions under those Acts which Reorganization Plan No. 21 gave to the Board might be transferred to the Administration.[5] In view of the clear limitation of jurisdiction in the Review Act to orders entered under the 1916 and 1933 Acts, and the absence of any reference in the legislative history to orders under the 1936 Act, the mere reference to the Administration does not indicate that Congress intended to make orders under the 1936 Act reviewable under 5 U. S. C. 1032.

[5] Petitioner's suggestion (Pet. 12–13) that the decision below is "germinating the seed of conflict" because of the dictum in a footnote in *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 869, note 6a (C. A. 9) that, "contrary to our assumption, Congress may have contemplated that [certain] orders of that [Maritime] Administration * * * were reviewable under the Act of Dec. 29, 1950, by the courts of appeals," constitutes no basis for granting certiorari.

Finally, we point out that dismissal of the petition to review by the court of appeals does not deny petitioner its right to effective judicial review of the Board's order. For, as noted (see *supra*, pp. 5, 6), there is presently pending before the district court a complaint in which petitioner is challenging the same order. If the district court ultimately should decide against petitioner,* petitioner may seek appellate review of that decision in ordinary course. Thus, the sole consequence of the ruling below is to require petitioner in the first instance to challenge the Board's order in the district court rather than in the court of appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
Attorney.

E. ROBERT SEAVER,
General Counsel,

ROBERT E. MITCHELL,
Assistant General Counsel,

EDWARD APTAKER,
EDWARD SCHMELTZER,
Attorneys,
Federal Maritime Board.

SEPTEMBER 1958.

* In the district court the Board, in addition to defending its order on the merits, has denied that it is reviewable at all

U. S. GOVERNMENT PRINTING OFFICE 1958